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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NICHOLAS FLOYD HLAVINKA,)
)
 Petitioner,)
)
 v.)
)
 WILLIAM McNAMEE, Field)
 Director of United States)
 Citizenship and Immigration)
 Services, Portland, Oregon;)
 UNITED STATES CITIZENSHIP AND)
 IMMIGRATION SERVICES,)
)
 Respondents.)

No. CV-09-3-HU

OPINION & ORDER

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1 - OPINION & ORDER

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2 Portland, Oregon 97204
Attorneys for Respondents

3 HUBEL, Magistrate Judge:

4 The matter before the court is respondents' motion to dismiss
5 the petition.

6 **Factual Background**

7 Petitioner Nicholas Hlavinka, a United States citizen, brings
8 this action challenging the denial by the United States Citizenship
9 and Immigration Service ("USCIS") of his Petition for Alien
10 Relative ("I-130 Petition"), filed on behalf of his wife,
11 Luzviminda Hlavinka. In an I-130 Petition, a citizen or lawful
12 permanent resident of the United States seeks to establish a
13 relationship to alien family members who wish to immigrate to the
14 United States.

15 Mrs. Hlavinka is a citizen of the Philippines. She has been
16 married three times. Petition ¶ 12. She married her first husband,
17 Alejandro Donato, in the Philippines in 1982. Id. at ¶ 18; USCIS
18 Denial of Petitioner's Form I-130, Respondent's Memorandum, Exhibit
19 C. She states in her affidavit that Donato abandoned her when she
20 was seven months pregnant with their child. Id.

21 She married her second husband, Wendell Leon Floyd,
22 approximately 13 years later, in July 1995 (the Floyd marriage).
23 Mrs. Hlavinka acknowledged to USCIS that she and Mr. Floyd
24 submitted a fraudulent Filipino death certificate for Donato to the
25 former Immigration and Naturalization Service ("INS"), along with
26 a certificate for their marriage stating she was a widow, because
27 divorce is not permitted in the Philippines and annulments are very
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1 expensive and time-consuming. Petition ¶¶ 15, 16; Affidavit of L.
2 Hlavinka in Support of Form I-485, Respondent's Memorandum, Exhibit
3 B ("L. Hlavinka Affidavit"), p. 1. Mrs. Hlavinka was admitted to
4 the United States on February 11, 1997 as the conditional permanent
5 resident spouse of a United States citizen.

6 Mrs. Hlavinka separated from Mr. Floyd on May 31, 1997; she
7 states in her affidavit that she left him because he beat her,
8 psychologically abused her, and threatened to kill her with a gun
9 he kept in the house. Id. The Columbia County Circuit Court entered
10 a final decree of dissolution for the Floyd marriage in July 1998.
11 Id. The USCIS terminated Mrs. Hlavinka's conditional permanent
12 resident status, based on its finding that Mrs. Hlavinka married
13 Mr. Floyd in order to obtain an immigration benefit. Petition ¶¶
14 15, 16.

15 Mrs. Hlavinka married Nicholas Hlavinka on December 30, 1998,
16 a marriage that Mrs. Hlavinka admits was invalid because she was
17 still legally married to Donato. L. Hlavinka Affidavit, p. 3. The
18 Hlavinkas married a second time in June 2002, and a third time on
19 May 12, 2003. Id.

20 In June 2003, Nicholas Hlavinka filed the I-130 Petition on
21 behalf of his wife. Petition ¶ 16. The I-130 Petition was denied on
22 the ground that Mrs. Hlavinka violated 8 U.S.C. § 1154(c) by
23 entering into the Floyd marriage for the purpose of obtaining an
24 immigration benefit. Petition ¶ 16. The decision was appealed to
25 the Board of Immigration Appeals ("BIA"). The BIA found
26 insufficient evidence to conclude that Mrs. Hlavinka violated 8
27 U.S.C. § 1154(c), and remanded the case to USCIS. Petition ¶ 17.

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1 On remand, USCIS, through Acting Field Office Director Barbara
2 Kveton, again denied the I-130 Petition (the FO decision). The FO
3 decision cited to Mrs. Hlavinka's Application to Register Permanent
4 Residence or Adjust Status ("I-485 Petition") in which she stated:

5 I engaged in misrepresentation when my first US citizen
6 husband, Wendell Leon Floyd, and I submitted [fraudulent]
7 [sic] death certificates for my first husband, Alejandro
8 Donato, to convince the US Embassy that Mr. Floyd and I
9 were validly married in order for me to obtain my
10 immigrant visa to enter the United States.

11 Respondent's Memorandum at Exhibit C, p. 3 (quoting Exhibit A, p.
12 5). USCIS concluded that by Mrs. Hlavinka's "own admissions in her
13 affidavits and on her I-485 Petition, and upon review of the entire
14 record of proceeding it is clear that [Mrs.] Hlavinka attempted to
15 enter into a marriage to evade immigration law." Id. at p. 4.

16 On October 25, 2007, the BIA affirmed the FO decision denying
17 Hlavinka's I-130 Petition. Respondent's Memorandum, Exhibit D. Mr.
18 Hlavinka petitions for review in this court.

19 **Standard**

20 The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*,
21 contains several anti-fraud provisions that bar entry to the United
22 States. The most expansive is the general fraud bar provided at 8
23 U.S.C. § 1182(a)(6)(C)(i), which bars an "alien who, by fraud or
24 willfully misrepresenting a material fact, seeks to procure (or has
25 sought to procure or has procured) a visa, other documentation, or
26 admission into the United States or other benefit provided under
27 this Act..." The marriage fraud bar, codified at 8 U.S.C. §
28 1154(c), applies when "the Attorney General has determined that the
alien has attempted ... to enter into a marriage for the purpose of
evading the immigration laws." Petitioner concedes that it is

1 nearly certain, given his wife's admissions, that Mrs. Hlavinka
2 will be subject to the general fraud bar, but nonetheless asserts
3 that the marriage bar is inapplicable.

4 Judicial review of the BIA's determination that an alien
5 committed marriage fraud is "an intrinsically fact-specific
6 question" that is reviewed under a substantial evidence standard,
7 with the agency having the burden of producing substantial evidence
8 in support of its determination. Nakamoto v. Ashcroft, 363 F.3d
9 874, 881 (9th Cir. 2004). The court must determine whether
10 substantial evidence supports a finding by clear and convincing
11 evidence that Mrs. Hlavinka committed marriage fraud. Id. at 882,
12 citing Khodagholian v. Ashcroft, 335 F.3d 1003, 1006 (9th Cir.
13 2003).

14 Discussion

15 The Petition alleges that respondents erred when they
16 "concluded that document fraud alone conclusively establishes
17 marriage fraud for purposes of [8 U.S.C. § 1154(c)]." Petition ¶
18 20. The marriage fraud bar, 8 U.S.C. § 1154 (c), provides that no
19 petition for immigrant status shall be granted if:

20 (1) the alien [sought] an immediate relative or
21 preference status as the spouse of a citizen of the
22 United States ... by reason of a marriage determined by
23 the Attorney General to have been entered into for the
24 purpose of evading the immigration laws, or (2) the
25 Attorney General has determined that the alien has
26 attempted or conspired to enter into a marriage for the
27 purpose of evading the immigration laws.

28 See also 8 C.F.R. § 204.2(a)(1)(ii) (USCIS may not approve a visa
petition for an alien who "has attempted or conspired to enter into
a marriage for the purpose of evading the immigration laws.")

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1 Respondents argue that the agency did not conclude that Mrs.
2 Hlavinka's document fraud alone established marriage fraud; rather,
3 they argue that in its denial of the I-130 petition, the agency
4 found that "the entire record of proceeding" established a
5 conspiracy to enter into a marriage for the purpose of evading the
6 immigration laws. See Respondents' Memorandum, Exhibit C, p. 3.
7 Likewise, respondents argue, the BIA did not, in its October 25,
8 2007 decision, conclude that Mrs. Hlavinka's document fraud,
9 standing alone, constituted marriage fraud, but rather that her
10 "bigamous marriage to Mr. Floyd was an attempt to enter into a
11 marriage for purposes of evading the immigration laws." Id. at
12 Exhibit D. Therefore, the government argues, both USCIS and the BIA
13 determined that it was Mrs. Hlavinka's bigamous marriage, not just
14 the falsified death certificate and marriage certificate, that
15 constituted marriage fraud for purposes of 8 U.S.C. § 1154(c).

16 Petitioner argues that the standard for determining, under §
17 1154(c), whether marriage fraud has been committed is not whether
18 the marriage in question was *legally valid*, but rather whether the
19 marriage was entered into without the intent to establish a life
20 together. Petitioner cites several cases from this jurisdiction to
21 this effect.¹

23 ¹ Lutwak v. United States, 344 U.S. 604 (1953) (marriage is
24 bona fide when parties have undertaken to establish a life
25 together); Bark v. INS, 511 F.2d 1200, 1238 (9th Cir.
26 1975) (marriage a sham if bride and groom did not intend to
27 establish a life together at the time they were married); Garcia-

1 Petitioner particularly relies on Johl v. United States, 370
2 F.2d 174, 177 (9th Cir. 1966) and Nakamoto. In Johl, the court held,

3 The immigration law, in granting advantages to those who
4 have married American citizens, is not talking about

5 Jaramillo v. INS, 604 F.2d 1236, 1237 (9th Cir. 1979) ("It is
6 within the authority of the INS to make inquiry into the marriage
7 to the extent necessary to determine if it was entered for the
8 purpose of evading the immigration laws. A marriage is a sham if
9 the bride and groom did not intend to establish a life together
10 at the time they were married. Conduct and lifestyle before and
11 after marriage is relevant to the extent it aids in determining
12 the intent of the parties at the time they were married."); Pena-
13 Urrutia v. INS, 640 F.2d 242 (9th Cir. 1980) ("It is entirely
14 appropriate for the INS to [inquire] into the marriage to the
15 extent necessary to determine whether it was entered into for the
16 purpose of evading the immigration laws. A marriage is a sham if
17 the bride and groom did not intend to establish a life together
18 at the time they were married."); United States v. Tagalicut, 84
19 F.3d 1180, 1185 (9th Cir. 1996) ("a marriage [is] a sham if the
20 bride and groom did not intend to establish a life together at
21 the time they were married"); Oropeza-Wong v. Gonzales, 406 F.3d
22 1135 (9th Cir. 2005) ("To determine the bona fides of the
23 marriage, the proper inquiry is whether [the parties] intended to
24 establish a life together at the time they were
25 married.") (applying 8 U.S.C. § 1186a(c)).
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1 ceremony or legality--the taking of those steps which
2 enable a couple lawfully to live together in a marital
3 relationship. It is talking about the marital
4 relationship itself--an actual joining together as
5 husband and wife.

6 In Nakamoto, the immigrant lived with her second husband and
7 their son in Hawaii. The INS commenced removal proceedings against
8 Nakamoto, alleging that under 8 U.S.C. §227(a)(1)(G)(ii), Nakamoto
9 had procured her visa by fraud. Nakamoto had initially entered the
10 country after marrying her first husband, Del Rosario, who was a
11 United States citizen. Nakamoto and Del Rosario's courtship had
12 commenced with five years of letters. Del Rosario then proposed and
13 flew to the Philippines to marry Nakamoto in 1992. Del Rosario
14 stayed in the Philippines for four days after the marriage ceremony
15 before returning to Hawaii. After Del Rosario returned to Hawaii,
16 the relationship began to deteriorate. Shortly after Del Rosario
17 left, Nakamoto discovered that Del Rosario had a girlfriend in
18 Hawaii. Nakamoto refused to go to Hawaii and wrote to Del Rosario
19 requesting a divorce.

20 The marriage was not dissolved, and Nakamoto continued to
21 write to Del Rosario for the next two years. In 1995, three years
22 after the marriage, Nakamoto agreed to join Del Rosario in Hawaii.
23 They spent two nights together in Hawaii, but did not live together
24 after that. Nakamoto subsequently met Daryl Nakamoto and gave birth
25 to their son. In 1997, Nakamoto brought suit to dissolve her
26 marriage to Del Rosario; Del Rosario counterclaimed for an
27 annulment of the marriage. In April 1997, the Hawaii family court
28 entered a decree of annulment on the ground that Nakamoto had

1 fraudulently obtained Del Rosario's consent to the marriage.²

2 The issue in Nakamoto was whether she was subject to removal
3 on the ground that she had entered into the marriage with Del
4 Rosario for the purpose of obtaining an immigration benefit. 363
5 F.3d at 877. The Immigration Judge (IJ) determined on September 10,
6 1999, that the INS had met its initial burden of proof and that the
7 Hawaii family court's annulment order and the letters submitted as
8 evidence "prove[d] that the marriage was a sham from the start."
9 Id. at 878. In denying Nakamoto relief from removal, the IJ
10 acknowledged that Nakamoto had "exceptional and outstanding
11 equities" of family ties and a good work history, and that her
12 removal would "cause terrible harm to [her] United States citizen
13 son." Id. Nevertheless, the IJ wrote that "she could not show by a
14 preponderance of the evidence that she did not enter into the
15 marriage for purpose of evading immigration laws," because "[t]here
16 [was] little or no conduct before or after the marriage to show
17 commitment. The time they spent together is negligible and there
18 are no joint assets." Id.

19 The Ninth Circuit affirmed, stating that the "focus of our
20 inquiry is whether Nakamoto and Del Rosario intended to establish
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22 ² The Hawaii family court's conclusion was based on evidence
23 that Nakamoto made misrepresentations with the intent to induce
24 Del Rosario to marry her and that Del Rosario relied on
25 Nakamoto's representations to his detriment. 363 F.3d at 883.
26 This is all the detail that can be gleaned from the Ninth Circuit
27 opinion.
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1 a life together at the time they were married." Id. at 882, citing
2 Bark, 511 F.2d at 1201. The court noted that although evidence that
3 the parties separated after the marriage was relevant to
4 ascertaining whether they intended to establish a life together at
5 the time of marriage, evidence of separation cannot, by itself,
6 support a finding that the marriage was not bona fide. Id.

7 The court examined the objective evidence that supported a
8 finding that the couple entered into the marriage with an intent to
9 establish a life together, and the evidence suggesting that
10 Nakamoto "married Del Rosario for immigration purposes, and that
11 the marital agreement was not fulfilled." Id. But the evidence the
12 court found to be the most "daunting hurdle" for Nakamoto was the
13 Hawaii family court's judgment of annulment. Id. at 883. Although
14 the annulment itself was "not dispositive," the Hawaii court's
15 finding that Del Rosario's consent to the marriage had been
16 obtained by fraud was entitled to full faith and credit. Id. The
17 court concluded that substantial evidence supported a finding by
18 clear and convincing evidence that Nakamoto committed marriage
19 fraud. Id. at 882.

20 Petitioner argues that document fraud cannot conclusively
21 establish marriage fraud under 8 U.S.C. § 1154(c) because document
22 fraud says little or nothing about the defining question: the
23 intent of the parties to make a life together.

24 The FO decision found that under the Family Code of the
25 Philippines (quoted in the decision) Mrs. Hlavinka could have filed
26 a Declaration of Presumptive Death prior to the Floyd marriage.
27 Under the Family Code, such a declaration makes a subsequent
28 marriage valid if the previous spouse has been absent for four

1 consecutive years and the declarant has "a well-founded belief that
2 the absent spouse was already dead." In case of disappearance where
3 there is danger of death, an absence of two years is sufficient.

4 The FO decision concludes:

5 the beneficiary could have filed for a Declaration of
6 Presumptive Death prior to her marriage to Wendell Floyd
7 in order to be legally free to marry. ... Instead, the
8 beneficiary chose to claim the status as a widow on her
9 marriage license, and the beneficiary and petitioner
10 chose to submit a fraudulent death certificate ... in
11 support of the beneficiary's visa petition.

12 Exhibit C p. 2-3. An implication of this discussion is that failure
13 to take this simple step reflects a lack of intent to make a life
14 together.

15 The decision also states that the Petition for Dissolution and
16 Annulment filed in Columbia County Circuit Court, dissolving the
17 Floyd marriage, was submitted to the USCIS by Mr. Floyd, and was
18 accompanied by an affidavit signed by Mr. Floyd stating that his
19 marriage to Mrs. Hlavinka was fraudulent. The decision concludes:

20 [A] review of the entire record of proceeding indicates
21 that the beneficiary conspired to enter into a bigamous
22 marriage with Wendell Floyd for the purpose of evading
23 immigration law and entering the United States. She knew
24 she was not legally free to marry Wendell Floyd as she
25 was already married at the time. If the beneficiary had
26 the intention of pursuing a true spousal relationship
27 with Wendell Floyd, she would have taken the necessary
28 legal steps to dissolve her first marriage.

29 Id. at p. 3-4. The respondents assert that the petition must be
30 dismissed because Mrs. Hlavinka explicitly admitted on her I-485
31 that she "submitted fraudulent death certificates for [her] first
32 husband" in order to convince the United States that she was
33 "validly married in order for [her] to obtain [her] immigrant visa
34 to enter the United States." Petition ¶ 18; Respondent's

Dennis James Hubel
United States Magistrate Judge

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